

I. Background

Plaintiff's complaint alleges that Defendants violated the CEA and CFTC regulations when Giziencki, a broker at EOX, exercised discretionary trading authority over an account belonging to an EOX client at the same time that Giziencki facilitated block trades for other EOX customers.¹ In pertinent part Plaintiff's Complaint alleges that "[a]t all relevant times, Defendants owed duties of trust and confidentiality to EOX customers by law or rule, by agreement, and by understanding."²

On March 9, 2020, defense counsel served EOX Holdings Fourth Set of Interrogatories and Second Set of Production Requests seeking, inter alia,

rules of other "registered entit[ies]" that may provide a source [of] that supposed duty or that might negate that source. . . .

1. For each and every Exchange, Board of Trade or Other Trading Market Entity, identify each and every rule and/or other policy or guidance of any kind whatsoever, and any amendment thereto, that prohibits or at any time prohibited, limits or limited, or regulates or regulated in any way whatsoever the disclosure of information by one party to any counterparty and/or potential counterparty to a block trade and/or potential block trade

¹Complaint for Injunctive Relief, Civil Monetary Penalties, and Other Equitable Relief ("Complaint"), Docket Entry No. 1, pp. 16-18 ¶¶ 75-85. Page numbers for docket entries in the record refer to the pagination inserted at the top of the page by the court's electronic filing system.

²Id. at 5 ¶ 20.

(including but not limited to the types of disclosures involved in this case that You are contending were improper). If any such entity does not have or did not have any such rule or other published mandatory policy, state "None" for that entity.

2. For each and every Exchange, Board of Trade or Other Trading Market Entity, identify each and every rule and/or other policy or guidance of any kind whatsoever, and any amendment thereto (including but not limited to CME Rule 532, CBOT Rule 532, NYMEX Rule 532, COMEX Rule 532, and ICE Europe Futures Rule G.4) that (1) exempts parties and counterparties in block trades and/or the negotiation of block trades from . . . any rule or other published mandatory policy that prohibits or at any time prohibited, limits or limited, or regulates or regulated in any way whatsoever the disclosure of information by one party to any counterparty and/or potential counterparty to a block trade and/or potential block trade, including the types of disclosures involved in this case that You are contending were improper, and/or (2) permits them, whether conditionally or not, to disclose such information and/or to engage in pre-execution communications, including communications for the purpose of discerning interest in the execution of a transaction prior to the terms of an order being submitted for execution. If any such entity does not have or did not have any such rule or other published mandatory policy, state "None" for that entity.³

³Defendants' Motion to Compel, Docket Entry No. 103, pp. 7-8 (quoting Defendant EOX Holdings LLC's Fourth Set of Interrogatories and Second Set of Production Requests ("EOX's Interrogatories and Production Requests"), Exhibit 12 to Defendants' Motion to Compel, Docket Entry No. 103-1, pp. 79-80, Interrogatories 1 and 2). Although the title of Exhibit 12 includes the words "Second Set of Production Requests," Defendants' Motion to Compel cites Exhibit 12 as including a "Third Set of Production Requests." To avoid confusion, the court will refer to Exhibit 12 as "EOX's Interrogatories and Production Requests."

On April 8, 2020, Plaintiff responded to EOX's Interrogatories and Production Requests generally by asserting a number of objections, and specifically as follows:

Interrogatory No. 11:⁴ . . .

RESPONSE:

The Commission objects to Interrogatory No. 11 on the grounds that it is overbroad, unduly burdensome and beyond the scope of permissible discovery because it seeks information that is irrelevant to the parties' claims and defenses and it is not proportional to the needs of the case pursuant to Fed. R. Civ. P. 26(b) to the extent it seeks "every rule and/or policy or guidance of any kind whatsoever" (collectively "Rules and Policies") from "each and every Exchange, Board of Trade or Other Trading Market Entity" (collectively "Exchanges and Trading Entities") because every Rule and Policy from every Exchange and Trading Entity is not relevant to the issues in this litigation. The Commission further objects to Interrogatory No. 11 to the extent it seeks information that is not in the Commission's possession, custody or control, and on the basis that it seeks information that is readily accessible to Defendants. Providing such information in answering this interrogatory would be oppressive, unduly burdensome and unnecessarily expensive, and the burden of providing such information in answering this interrogatory is substantially the same or less for Defendants as for the Commission. See Federal Rule of Civil Procedure 33(d).
. . . .

Subject to and without waiving these objections and the General objections, the Commission refers to its answer to Interrogatory No. 7. As stated in its answer

⁴The Plaintiff "re-numbered Defendants' Fourth Set of Interrogatories to reflect the total number of interrogatories served upon the Commission. As a result, the Interrogatories referenced are numbered 11 and 12, respectively, in the Commission's responses." Plaintiff's Response in Opposition to Defendants' Motion to Compel Discovery Regarding the Source of the CFTC's Alleged "Duty of Trust and Confidentiality" ("Plaintiff's Response"), Docket Entry No. 105, p. 11 n.3.

to Interrogatory No. 7, the Commission's investigation continues, and the Commission reserves the right to supplement this answer after conducting additional discovery. The Commission further refers to ECF Nos. 1 and 35.

INTERROGATORY NO. 12: . . .

RESPONSE:

The Commission objects to Interrogatory No. 12 on the grounds that it is overbroad, unduly burdensome and beyond the scope of permissible discovery because it seeks information that is irrelevant to the parties' claims and defenses and it is not proportional to the needs of the case pursuant to Fed. R. Civ. P. 26(b) to the extent it seeks "every rule and/or policy or guidance of any kind whatsoever" (collectively "Rules and Policies") from "each and every Exchange, Board of Trade or Other Trading Market Entity" (collectively "Exchanges and Trading Entities") because every Rule and Policy from every Exchange and Trading Entity is not relevant to the issues in this litigation. The Commission further objects to Interrogatory No. 12 to the extent it seeks information that is not in the Commission's possession, custody or control, and on the basis that it seeks information that is readily accessible to Defendants. Providing such information in answering this interrogatory would be oppressive, unduly burdensome and unnecessarily expensive, and the burden of providing such information in answering this interrogatory is substantially the same or less for Defendants as for the commission. See Federal Rule of Civil Procedure 33(d). . . .

Subject to and without waiving these objections and the General objections, the Commission refers Defendants to CFTC-02-0000000932-1062. The Commission's investigation continues, and the Commission reserves the right to supplement this answer after conducting additional discovery.⁵

Citing Federal Rule of Civil Procedure 37(a)(1), Defendants move the court "to compel Plaintiff . . . to respond to [EOX's

⁵Plaintiff's Response to Defendants' Fourth Set of Interrogatories, Exhibit 13 to Defendants' Motion to Compel, Docket Entry No. 103-1, pp. 88-90.

Interrogatories and Production Requests] directed at the source of the supposed duty of 'trust and confidentiality' that the CFTC seeks to impose on [them]."⁶

II. Standard of Review

Federal Rule of Civil Procedure 37(a)(3)(B) allows a party seeking discovery to move for an order compelling production against another party when the latter has failed to answer interrogatories submitted under Federal Rule of Civil Procedure 33, or failed to produce documents requested under Federal Rule of Civil Procedure 34. Fed. R. Civ. P. 37(a)(3)(B)(iii)-(iv). See Crosswhite v. Lexington Insurance Co., 321 F. App'x 365, 368 (5th Cir. 2009) ("A party may move to compel production of materials that are within the scope of discovery and have been requested but not received."). "[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Fed. R. Civ. P. 37(a)(4). "[A] party is subject to sanctions under Rule 37(c)(1) if the 'party fails to provide information or identify a witness as required by Rule 26(a) or (e), . . . unless the failure was substantially justified or is harmless.'" Olivarez v. GEO Group, Inc., 844 F.3d 200, 203 (5th Cir. 2016). The party filing the motion to compel bears the burden of showing that the materials and information are within the scope

⁶Defendants' Motion to Compel, Docket Entry No. 103, p. 1.

of permissible discovery and that Rule 26(g)(1)'s certification requirement has been satisfied. See Carr v. State Farm Mutual Automobile Insurance Co., 312 F.R.D. 459, 469 (N.D. Tex. 2015). Once the moving party establishes that the materials requested are within the scope of permissible discovery the burden shifts to the party resisting a motion to compel who "must show specifically how . . . each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive." O'Bryant v. Walgreen Co., No. 19-60363, 802 F. App'x 826, 833 (5th Cir. 2020) (per curiam) (quoting McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990)).

III. Analysis

Defendants move the court to compel Plaintiff to respond to EOX's Interrogatories and Production Requests directed at the source of the supposed duty of "trust and confidentiality" that the Plaintiff seeks to impose on the Defendants.⁷ Defendants argue that their "simultaneous production requests required the production of the rules and all related documents and communications regarding their promulgation, submission to the CFTC, approval and amendment,"⁸ and that "[t]he Interrogatory includes CME Rules because an important question is what form of

⁷Id. at 1.

⁸Id. at 8.

Rule 526, that the CFTC cites for the supposed duty, in 2013-14 when the instant trades occurred.”⁹ Defendants argue that they also requested “the production of all documents related to any other investigation or proceeding by the CFTC into block trading or ‘insider trading,’ including two cases the CFTC has touted as part of its ‘Insider Trading Task Force.’”¹⁰ Defendants argue that Plaintiff made a blanket objection to all of their discovery requests, interrogatories, and production requests on essentially the same grounds, and that answers provided to Production Requests 2, 3, and 6 were also incorrect insofar as they stated that Plaintiff had already produced responsive documents, i.e., “CFTC-02-0000000933-2926” and “CFTC-02-0000000932-1062” because “those document ranges contain nothing responsive and are merely some bank records, correspondence by IFUS, and trade documents, including a 1500 page ‘trade register’ that states the details of hundreds of trades (CFTC-02-00000001411-2910).”¹¹ Defendants argue that Plaintiff’s “blanket objections on various grounds: burden, proportionality, availability from other sources, . . . [and] ‘relevancy’ . . . [a]ll are meritless.”¹²

⁹Id.

¹⁰Id.

¹¹Id. at 8-9.

¹²Id. at 9. See also Defendants’ Reply on Their Motion to Compel Discovery Regarding the Source of the CFTC’s Alleged “Duty of Trust and Confidentiality” (“Defendants’ Reply”), Docket Entry

Asserting that "[t]he Commission responded to Defendants' Interrogatory No. 7, the request at the center of this dispute, on November 21, 2019,"¹³ Plaintiff argues that Defendants' Motion to Compel should be denied because (1) Defendants failed to meet and confer on all the discovery issues; (2) Plaintiff adequately responded with respect to the "understanding" in the industry regarding a duty of trust and confidentiality; (3) Plaintiff's response and objections to Defendants' discovery requests related to "each and every other Exchange, Board of Trade or Other Trading Market Entity" are meritorious; and (4) Plaintiff's response and objections to Defendants' discovery requests related to the Insider Trading Task Force and other insider trading cases are meritorious.

A. Applicable Law

"[T]he district court has wide discretion in determining the scope and effect of discovery." Quintero v. Klaveness Ship Lines, 914 F.2d 717, 724 (5th Cir. 1990), cert. denied, 111 S. Ct. 1322 (1991). Rule 26(b)(1) generally allows a party to

obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery

No. 106, pp. 4-7.

¹³Plaintiff's Response, Docket Entry No. 105, p. 4.

outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1).

To be relevant under Rule 26(b)(1), a document or information need not, by itself, prove or disprove a claim or defense or have strong probative force or value. If it were otherwise, it would make little sense for Rule 26(b)(1) to direct courts to consider whether discovery that is relevant to any party's claim or defense is also important in resolving the issues.

Samsung Electronics America, Inc. v. Yang Kun Chung, 321 F.R.D. 250, 280 (N.D. Tex. 2017). Proportionality takes into account "the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense . . . outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). A party may withhold information that would be otherwise discoverable on the basis of privilege, Fed. R. Civ. P. 26(b)(1), but it must expressly make the claim and describe the nature of the document being withheld, Fed. R. Civ. P. 26(b)(5). The court must limit discovery that it determines is "unreasonably cumulative or duplicative," that the requesting party "has had ample opportunity to obtain," or that is "outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C).

Federal Rule of Civil Procedure 33 allows a party to "serve on any other party no more than 25 written interrogatories, including all discrete subparts." Fed. R. Civ. P. 33(a)(1). "Leave to serve

additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2)." Id. "An interrogatory may relate to any matter that may be inquired into under Rule 26(b)." Fed. R. Civ. P. 33(a)(2).

Federal Rule of Civil Procedure 34 allows a party to request production or inspection of "any designated documents or electronically stored information" as well as "any designated tangible things." Fed. R. Civ. P. 34(a)(1)(A)-(B). Any such request "must describe with reasonable particularity each item or category of items to be inspected" and "must specify a reasonable time, place, and manner for the inspection and for performing the related acts." Fed. R. Civ. P. 34(b)(1)(A)-(B).

"The party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable." Samsung, 321 F.R.D. at 283 (citing McLeod, 894 F.2d at 1485). "Failing to do so . . . makes such an unsupported objection nothing more than unsustainable boilerplate." Id. (quoting Heller v. City of Dallas, 303 F.R.D. 466, 490 (N.D. Tex. 2014)).

B. Application of the Law to the Facts

1. Defendants' Motion Contains a Certification of Conferral

Rule 37(a) requires a motion to compel to "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court

order." Fed. R. Civ. P. 37(a)(1). The first page of Defendants' Motion to Compel contains a "Certification of Conferral." Plaintiff acknowledges that "[o]n June 9, 2020, counsel for Defendants and counsel for the Commission held a telephonic meet and confer regarding the response to Interrogatory No. 7 that the Commission served on November 21, 2019."¹⁴ Although Plaintiff argues that Defendants' Motion to Compel should be denied because "[c]ounsel for Defendants never raised his concerns with the Commission's response to any other discovery request,"¹⁵ Plaintiff's response to the interrogatories posed in EOX's Interrogatories and Production Requests refers to its answer to Interrogatory No. 7, and Plaintiff argues that "[t]he Commission fulfilled its obligation under Rule 33 with its response to Interrogatory No. 7."¹⁶ Because Plaintiff responded to Interrogatory No. 1 of EOX's Interrogatories and Production Requests by referring Defendants to Plaintiff's response to Interrogatory No. 7, and because Plaintiff's Response acknowledges that opposing counsel held a telephonic meet and confer regarding the response to Interrogatory No. 7, the court concludes that Defendants have satisfied Rule 37(a)'s certification requirement, and that their Motion to Compel should not be denied for failure to satisfy that requirement.

¹⁴Id. at 5.

¹⁵Id.

¹⁶Id. at 10.

2. Plaintiff Has Adequately Responded with Respect to the Alleged "Duty of Trust and Confidentiality".

The pending motion seeks to compel the Plaintiff "to respond to [EOX's Interrogatories and Production Requests] directed at the source of the supposed duty of 'trust and confidentiality' that the CFTC seeks to impose on Defendants."¹⁷ Plaintiff's Response to Interrogatory No. 1 in EOX's Interrogatories and Production Requests sets forth a number of objections, and then states that "[s]ubject to and without waiving these objections, the Commission refers to its answer to Interrogatory No. 7."¹⁸ Defendants' Interrogatory No. 7 asked the Commission to:

Identify each "law," "rule," "agreement" and "understanding" pursuant to which you contend Defendants owed duties of trust or confidentiality, and each EOX customer to whom you contend owed such duties as a result of each "law," "rule," "agreement" and/or "understanding," as alleged in paragraph 20 of the complaint.¹⁹

Plaintiff provided detailed responses to each of the four parts of this request.²⁰ Defendants fail to explain how or why the responses that Plaintiff provided to Interrogatory No. 7 fail to adequately respond to their request for information with respect to "the source of the supposed duty of 'trust and confidentiality' that the

¹⁷Defendants' Motion to Compel, Docket Entry No. 103, p. 1.

¹⁸Plaintiff's Response to Defendants' Fourth Set of Interrogatories, Exhibit 13 to Defendants' Motion to Compel, Docket Entry No. 103-1, p. 89.

¹⁹Plaintiff's Response, Docket Entry No. 105, p. 6.

²⁰See Response to Interrogatory No. 7, Exhibit 1 to Plaintiff's Response, Docket Entry No. 105-1, pp. 2-8.

CFTC seeks to impose on Defendants.”²¹ The court has carefully reviewed Plaintiff’s response to Interrogatory No. 7 and concludes that plaintiff has adequately responded to Defendants’ request for information with respect to the CFTC’s alleged “duty of trust and confidentiality.” Moreover, since “a party is subject to sanctions under Rule 37(c)(1) if the ‘party fails to provide information or identify a witness as required by Rule 26(a) or (e), . . . unless the failure was substantially justified or is harmless,’” Olivarez, 844 F.3d at 203, if Plaintiff attempts to rely on any additional sources for the “duty of trust and confidentiality” that have not been disclosed to Defendants during discovery, Defendants may move the court to strike or seek other appropriate relief.

3. Plaintiff’s Objections to Defendants’ Discovery Requests Related to “Each and Every Other Exchange, Board of Trade or Other Trading Market Entity” Are Meritorious

EOX’s Interrogatories Nos. 1 and 2 ask Plaintiff to identify “[f]or each and every Exchange, Board of Trade or Other Trading Market Entity,”

[(1)] each and every rule and/or other policy or guidance of any kind whatsoever, and any amendment thereto, that prohibits or at any time prohibited, limits or limited, or regulates or regulated in any way whatsoever the disclosure of information by one party to any counterparty and/or potential counterparty to a block trade and/or potential block trade (including but not limited to the types of disclosures involved in this case that You are contending were improper.); and

²¹Defendants’ Motion to Compel, Docket Entry No. 103, p. 1.

[(2)] each and every rule and/or other policy or guidance of any kind whatsoever, and any amendment thereto (including but not limited to CME Rule 532, CBOT Rule 532, NYMEX Rule 532, COMEX Rule 532, and ICE Europe Futures Rule G.4), that (1) exempts parties and counterparties in block trades and/or the negotiation of block trades from . . . any rule or other published mandatory policy that prohibits or at any time prohibited, limits or limited, or regulates or regulated in any way whatsoever the disclosure of information by one party to any counterparty and/or potential counterparty to a block trade and/or potential block trade, including the types of disclosures involved in this case that You are contending were improper, and/or (2) permits them, whether conditionally or not, to disclose such information and/or to engage in pre-execution communications, including communications for the purpose of discerning interest in the execution of a transaction prior to the terms of an order being submitted for execution.²²

Plaintiff responded to these interrogatories by objecting based on their overbreadth, irrelevance to the allegations of the Complaint, the burden of responding to it, and the fact that the information requested is not in the Commission's control. The Plaintiff also responded to Interrogatory No. 1 by referencing Interrogatory No. 7, and to Interrogatory No. 2 by referencing all documents and communications it had with an exchange related to this matter (IFUS), which it had already produced.²³

Plaintiff argues that Defendants' requests related to "Each and Every Other Exchange, Board of Trade or Other Trading Market

²²EOX's Interrogatories and Production Requests, Exhibit 12 to Defendants' Motion to Compel, Docket Entry No. 103-1, pp. 79-80.

²³Plaintiff's Response, Docket Entry No. 105, pp. 11-12. See also Plaintiff's Response to Defendants' Fourth Set of Interrogatories, Exhibit 13 to Defendants' Motion to Compel, Docket Entry No. 103-1, pp. 88-90.

Entity" are overbroad because Defendants define "Exchange, Board of Trade or Other Trading Market Entity," as

every Registered Entity (as that term is used in the [CEA], as amended and any Regulations promulgated by You), exchange, futures exchange, options exchange, contract market, board of trade, foreign board of trade, derivatives clearing organization, trading facility, derivative, transaction execution facility, swap data repository, swap execution facility, and/or any other organization or entity of any kind, in existence and/or operating since January 1, 1983 (including but not limited to during the Relevant Period alleged in Paragraph 1 of Your Complaint in this Action), whether or not registered with or regulated by You.²⁴

Asserting that "[s]uch an all-encompassing definition is overbroad on its face,"²⁵ and that "the Exchange Requests are overbroad in that they seek information from all the above-mentioned entities related to the prohibition or regulation of the disclosure of confidential information but also for any information that exempts or permits such disclosures,"²⁶ Plaintiff argues that "[t]his Court should deny Defendants' Motion to Compel additional responses to such an unwieldy request and uphold the Commission's objections."²⁷ Asserting that "the Exchange Requests are improper because they seek documents of third parties from the Commission,"²⁸ and that

²⁴Plaintiff's Response, Docket Entry No. 105, p. 12 (quoting EOX's Interrogatories and Production Requests, Exhibit 12 to Defendants' Motion to Compel, Docket Entry No. 103-1, pp. 77-78 ¶ 9).

²⁵Id. at 13.

²⁶Id.

²⁷Id.

²⁸Id.

"the Commission does not allege that the transactions at issue were governed by the rules or policies of any exchange other than IFUS,"²⁹ Plaintiff argues that Defendants have failed to establish that the Commission has control or possession of documents requested in the Exchange Requests, and that these requests are neither relevant nor proportional to the needs of the case.³⁰

"If a discovery request is overbroad, the responding party must, to comply with Rule 33 or Rule 34, explain the extent to which it is overbroad and answer or respond to the extent that it is not – and explain the scope of what the responding party is answering or responding to." Heller, 303 F.R.D. at 488 (citing Consumer Electronics Association v. Compras and Buys Magazine, Inc., No. 08-21085-CIV, 2008 WL 4327253, at *2 (S.D. Fla. September 18, 2008) ("If there is an objection based upon an unduly broad scope, such as time frame or geographic location, discovery should be provided as to those matters within the scope which is not disputed. For example, if discovery is sought nationwide for a ten-year period, and the responding party objects on the grounds that only a five-year period limited to activities in the state of Florida is appropriate, the responding party shall provide responsive discovery falling within the five-year period as to the State of Florida.")).

²⁹Id. at 14.

³⁰Id. at 13-15.

Acknowledging that Plaintiff has identified relevant rules from three entities, Defendants reply that "[t]he discovery requests at issue simply require the CFTC to identify the rules of entities other than the three it does specifically cite to (IFUS, CME & FINRA) that pertain to block trading."³¹ Asserting that their discovery requests "seek information and materials only in the CFTC's possession,"³² and that they "are entitled to the discovery at issue: other exchange rules that will further inform the existence and scope of the CFTC's so-called 'industry understanding,'"³³ Defendants argue that the CFTC cannot "claim that rules of some industry entities create an 'understanding' about a supposed duty of confidentiality in block trading, while refusing to disclose rules of other entities that negate this understanding."³⁴

Plaintiff has responded to Defendants' discovery requests by identifying the only rule it contends applies to the claims asserted in this action, i.e., IFUS Rule 4.02(i).³⁵ Defendants request rules and amendments applicable to a broad universe of both domestic and foreign entities without demonstrating either that

³¹Defendants' Reply, Docket Entry No. 106, p. 6.

³²Id. at 3-4.

³³Id. at 8.

³⁴Id. at 8-9.

³⁵See Response to Interrogatory No. 7, Exhibit 1 to Plaintiff's Response, Docket Entry No. 105-1, p. 4 ¶ 2.

Plaintiff possesses the information sought or that Defendants are unable to obtain that information from publicly available sources. Accordingly, the court concludes that Plaintiff's objections to Defendants' request for additional information related to rules and amendments for "Each and Every Other Exchange, Board of Trade or Other Trading Market Entity" are meritorious. Because "a party is subject to sanctions under Rule 37(c)(1) if the 'party fails to provide information . . . as required by Rule 26(a) or (e), . . . unless the failure was substantially justified or is harmless,'" Olivarez, 844 F.3d at 203, if Plaintiff attempts to rely on any rules that have not been disclosed to Defendants during discovery, Defendants may move the court for appropriate relief.

4. Plaintiff's Response and Objections to Defendants' Discovery Requests Related to the Insider Trading Task Force and Other Insider Trading Cases are Meritorious

Defendants contend that

[g]iven the CFTC's admission that there are no precedents for this case, and because the CFTC's press release nevertheless trumpeted the connection between this case and its insider trading "task force," Defendants also requested the production of all documents related to any other investigation or proceeding by the CFTC into block trading or "insider trading," including two cases the CFTC has touted as part of its "Insider Trading Task Force."³⁶

Defendants argue that

the discoverability of the CFTC's insider trading materials . . . fairly arises from the CFTC's citation of SEC insider trading law as a source of the duty, as well

³⁶Defendants' Motion to Compel, Docket Entry No. 103, p. 8.

as its own chest-pounding press release that cloaked this case with its "insider trading" program.

. . .

Given that the contours of insider trading in the futures, options and derivatives arena is fraught with uncertainty, therefore, policy statements, briefs and filings in other cases, and all related materials are clearly relevant to figuring out what the CFTC's own view is of the breadth and scope of the statutes and regulations it seeks to enforce for the block trades at issue here.³⁷

Plaintiff responds that "[e]ven if the Commission is pursuing a novel legal theory, the merit of that theory is properly addressed in a motion for summary judgment, not a motion to compel discovery."³⁸ Plaintiff also responds that

[t]his request is overbroad because it seeks the production of (1) every document and communication related in any way to anything the CFTC (department of enforcement or otherwise) has ever done, without any time limitation, that pertains to disclosing information and block trading or insider trading, and (2) any cases originated, developed, assigned to [be] reviewed by or handled in any way by the CFTC's Insider Trading Task Force (the "Insider Trading Request"). . . .³⁹

To the extent that Defendants seek policy statements, briefs, and filings from other cases, those are publicly available documents that are equally accessible to both parties. Since the parties appear to agree that the Commission is pursuing a novel legal theory in this case, Defendants have failed to establish how

³⁷Id. at 12-13. See also Defendants' Reply, Docket Entry No. 106, p. 7 (same).

³⁸Plaintiff's Response, Docket Entry No. 105, p. 15.

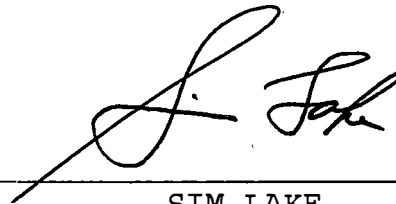
³⁹Id. at 16.

documents from other cases could possibly fall within the scope of permissible discovery. See Crosswhite, 321 F. App'x at 368 ("A party may move to compel production of materials that are within the scope of discovery . . ."). Moreover, the merit of any novel legal theory is properly addressed in a motion for summary judgment, not a motion to compel. Accordingly, the court concludes that Plaintiff's objections to Defendants' request for additional information related to the Insider Trading Task Force and other insider trading cases are meritorious.

IV. Conclusions and Order

For the reasons stated in § III, above, Defendants' Motion to Compel Discovery Regarding the Source of the CFTC's Alleged "Duty of Trust and Confidentiality" (Docket Entry No. 103) is **DENIED**.

SIGNED at Houston, Texas, on this the 5th day of March, 2021.

A handwritten signature in black ink, appearing to read "Sim Lake", is written over a horizontal line.

SIM LAKE
SENIOR UNITED STATES DISTRICT JUDGE